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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 684.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and JOSEPH HAYES, THOMAS HAYES, HELEN HAYES and MARY HAYES, minors, by MARY LORDAN, guardian of their persons and estates,

Plaintiffs in Error,

vs.

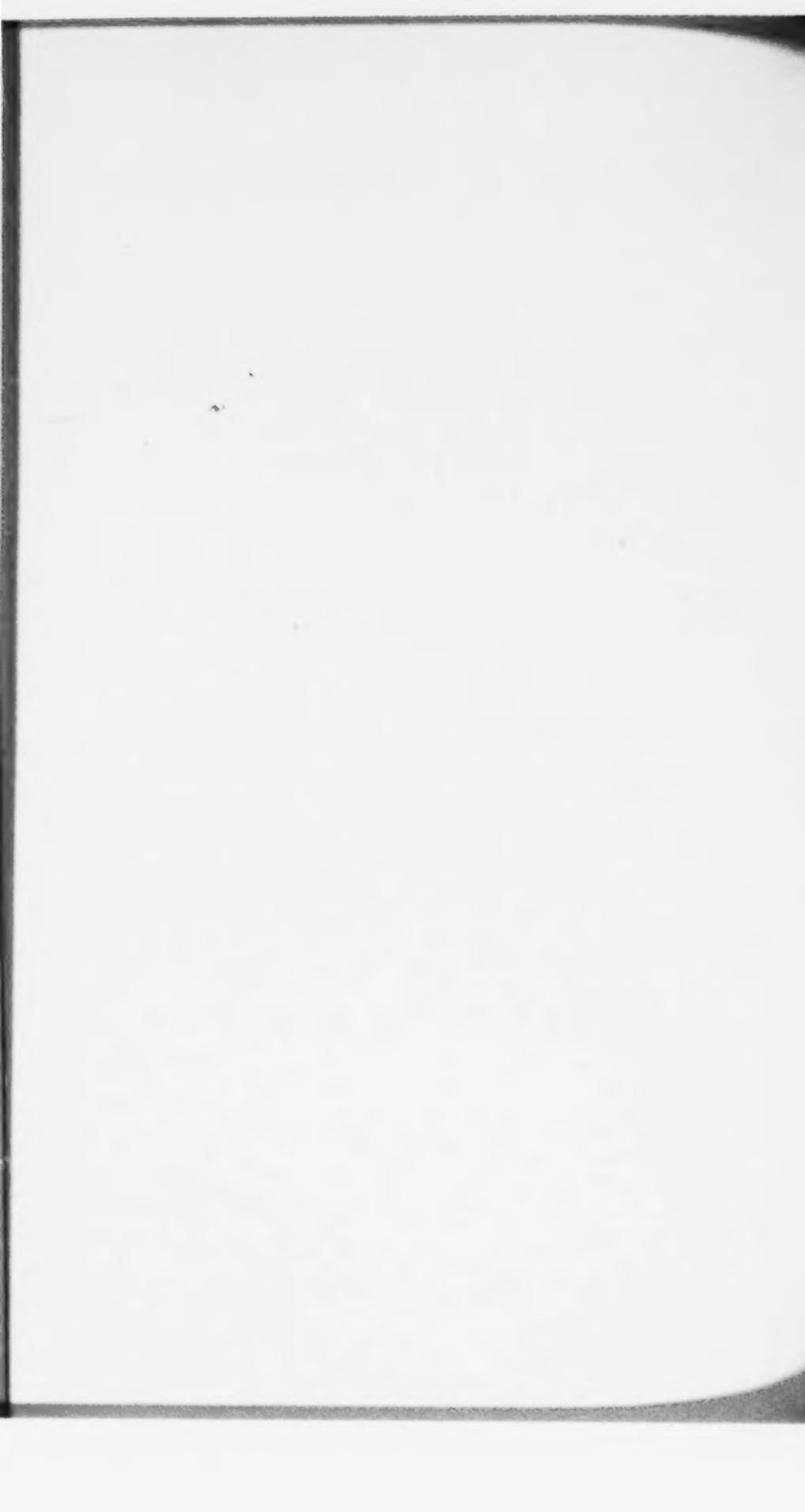
JAMES ROLPH COMPANY and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a corporation,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

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CALIFORNIA STATE PRINTING OFFICE
FRANK J. SMITH, Superintendent
SACRAMENTO, 1923



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Plaintiffs in Error,
vs.

JAMES ROLPH COMPANY and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a corporation,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

The first question presented to this court is whether the act of congress of June 10, 1922, 42 Stat. 634, Chap. 216, amending sections 24 and 256 of the Judicial Code to permit state workmen's compensation acts to apply to injuries sustained by persons in maritime service, other than masters and members of the crew of vessels, is constitutional.

The issue is whether congress may, during its pleasure, retract the federal jurisdiction in maritime matters involving injuries to local port workers, such as employees of stevedoring companies, of material men, supply men and ship repair yards, etc., permanent residents of the states in which they reside and earn their living, and thereby permit the states to make applicable to such workers under their police power the compensation laws they have enacted to protect their other citizens and workers generally. The power asserted, in brief, is to repeal portions of the federal substantive maritime law, in order to remove interference with protection by the states of their own local workers under their police power.

The second question tendered to this court is whether employers in local and harbor maritime work are prevented by the maritime law of the United States from voluntarily electing to bring themselves and their employees under state workmen's compensation acts, *i.e.*, from adopting by implied contract (in the manner provided in the elective provisions of such acts) the provisions of a state workmen's compensation act in the place of the rights and duties imposed by the law maritime. We understand the decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, to expressly permit such acceptance of state acts by election, but the Supreme Court of California has interpreted this decision otherwise. This question is also tendered to the court at this time in *Industrial*

Accident Commission of the State of California and Mrs. Jenny A. Denny, petitioners, vs. Zurich General Accident and Liability Insurance Company, Limited, respondents, No. 682, this term, in which petition for writ of certiorari has not yet been acted upon.

STATEMENT OF THE FACTS.

Eugene Hayes, a stevedore, was killed by a fall into an open hatchway on September 5, 1922, while working on the steamship West Islip at San Francisco in the unloading of a cargo of coal. The vessel was tied to her dock at the time and afloat upon navigable waters of San Francisco Bay. James Rolph Company, defendant in error, was Hayes' employer and was insured in defendant in error General Accident, Fire and Life Assurance Corporation under a policy of workmen's compensation insurance indemnifying it against loss under both the California Workmen's Compensation Act and the common law, including the maritime law. This policy was sufficiently broad to insure the employer under the compensation act if Hayes' injury be governed by it under any theory.

The California Workmen's Compensation Act, Chap. 586, Cal. Stat. 1917, is of compulsory obligation for most industries in the state and elective as to all others. Employers and employees of any class not within the compulsory provisions of the act may by their joint election bring themselves within it. By Sec. 70 of the act, such election may be made by the

employer taking out a policy of workmen's compensation insurance covering the employees in question. The California Supreme Court had held in *Zurich General Accident and Liability Insurance Co., vs. Industrial Accident Commission of California and Mrs. Jenny A. Denny*, 218 Pae. 563, being the case referred to above as now before this court upon petition for *certiorari*, that the procuring of such insurance would be sufficient to bind the employer except for the determination that any election to come under the State Compensation Act was prohibited by the maritime law. The decision in that case was incorporated into the decision of the case at bar by reference without redetermining the question.

The case now comes before this court on writ of error granted by the chief justice of the Supreme Court of California. Industrial Accident Commission of California appears as a plaintiff in error with Hayes' minor children for the reason that it was the principal respondent in the proceedings before the California Supreme Court in review of its decision in this case and, further, that it is authorized by the California statutes to appear by its own counsel in any proceeding in review of its decisions or affecting its jurisdiction. It has so appeared in this court in several cases, including *Industrial Accident Commission of California vs. Davis*, 259 U. S. 182.

This case has been advanced to January 7, 1924, to be heard with No. 366, *State of Washington vs. Dawson*, involving the constitutionality of the same statute.

HISTORY OF THE QUESTION.

Relation of States to Federal Government in Maritime Matters Prior to 1917.

Prior to 1917, the generally accepted view was as follows:

1. Under the reservation of a common law remedy to the state courts in the grant of judicial power to the United States district courts in admiralty matters (Sects. 24 and 256, Judicial Code), the state courts have exercised concurrent jurisdiction with the admiralty courts in practically all proceedings of admiralty and maritime nature except prize cases and proceedings *in rem* to enforce maritime liens. *The Moses Taylor*, 4 Wall. 411; *The J. E. Rumbell*, 148 U. S. 1, 12. This "saving clause" includes later statutory remedies enacted by the states. *Leon vs. Galceron*, 11 Wall. 185; *Rounds vs. Cloverport*, 237 U. S. 303.

2. Where a suit was tried in the admiralty court, the law maritime was applied as the substantive law of the case (*The Max Morris*, 137 U. S. 1), but where the suit was tried in the state court or on the law side of the federal court, it was definitely held that the state law was to be applied instead of the admiralty rules. *American Steamboat Co. vs. Chase*, 16 Wall. 522; *Atlee vs. Packet Co.*, 21 Wall. 389; *Belden vs. Chase*, 150 U. S. 674, 691; *The Hamilton*, 207 U. S. 398.

3. State statutes were permitted to apply generally to supplement or modify the maritime law. *The*

J. E. Rumbell, 148 U. S. 1, 12 (statute creating maritime lien for vessel in home port); *Leon vs. Galceron*, 11 Wall. 185 (statute providing remedy of sequestration); *American Steamboat Co. vs. Chace*, 16 Wall. 522 (death statute); *The Hamilton*, 207 U. S. 398 (death statute); *Anderson vs. Pacific Coast S. S. Co.*, 225 U. S. 187 (pilotage). The only cases in which state statutes were not allowed to apply were where they contravened an applicable act of congress, attempted to authorize proceedings *in rem* in a state court, or attempted to directly regulate interstate or foreign commerce. *The Moses Taylor*, 4 Wall. 411; *Hall vs. De Cuir*, 95 U. S. 485. Such state statutes not only furnished the rule of decision in proceedings in the state courts but were given effect by the federal courts in admiralty proceedings as well, at least, where the maritime law did not have a rule of its own to apply. *Peyroux vs. Howard*, 7 Pet. 324 (statute creating maritime lien); *The Hamilton*, 207 U. S. 398 (death statute).

Growing Inadequacy of Maritime Law.

The rules of the admiralty law for injuries occurring in maritime service were developed for sailors. Port workers, being *infra corpus comitatus*, came under the municipal law. Ultimately the admiralty rules were extended to cover matters occurring in harbors and interior waters, so that they have come to apply to port and harbor workers, although not altered to fit their situation. The rule of *The*

Osceola, 189 U. S. 158, of care and maintenance until the end of the voyage, was never made for longshoremen. Today we have the anomalous result that sailors have been taken out of the maritime rules (Sec. 33, Merchant Marine Act of 1920) but longshoremen and port workers remain under them, except for the act of congress here involved.

Our industrial development of the last fifty years has brought about much legislation to improve the condition of factory and industrial workers. Employers' liability acts, represented by the Federal Employers' Liability Act, were passed in nearly all states, to modify or supplement the common law rules for determining liability. They have in turn been superseded by workmen's compensation legislation, now adopted in forty-three of our states and by the federal government for its own employees. Act September 7, 1916, 39 Stat. 743, c. 458.

The antiquated rules of the maritime law for personal injuries are set forth in *The Osceola*, 189 U. S. 158, and summed up in *Carlisle Packing Co. vs. Sandanger*, 259 U. S. 255. As will be seen from these cases, such rules omit all protection to widows and dependents of maritime workers, allow nothing for loss of wages during disability extending beyond the end of the voyage, and give no indemnity for permanent disablement, except where the vessel is unseaworthy. All of these features are very important factors of modern relief. The remedy provided for enforcement of rights under the maritime law is an

action in the admiralty courts, or in the state courts under the "saving clause," which remedy involves much greater delay and expense than the remedy provided by state workmen's compensation acts, usually of an informal proceeding before a board or commission. To a maritime worker, delay and expense of litigation may frequently be more prohibitive of justice than an unjust decision.

The maritime law has not shared in the amelioration of the common law by state statutes. None of the betterments provided by modern remedial legislation have been made applicable, at least to port and harbor workers. Efforts of the states to apply their workmen's compensation acts to such port employments have been made futile by the decisions of this court in *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372, and *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, each decided by a divided court. The laudable purpose is expressed in these cases of freeing the national maritime law from divergent state legislation, but the net result has been to prevent amelioration of the maritime law by state statutes of a type previously accepted by this court, such as state death statutes, state statutes creating a lien upon a vessel in her home port, etc.

The efforts of congress to modernize the law relating to maritime injuries has, as yet, been fruitless.

Three statutes have been passed to better the condition, the first of which was declared unconstitutional in *Knickerbocker Ice Co. vs Stewart*, 253 U. S.

149; the second, the Merchant Marine Act of 1920, Sec. 33, is now under attack upon constitutional grounds in the lower federal courts (*Panama R. Co. vs. Johnson*, 289 Fed. 964), and the third is now before this court in the present proceeding.

Resume of Decisions and Statutes Since 1917.

(1) In *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372, it was held by a bare majority of the court that the rules of the maritime law constitute the rule of decision for actions in state courts under the "saving clause," as well as in admiralty, overruling without expressly mentioning *American Steamboat Co. vs. Chase*, 16 Wall. 522; *Atlee vs. Packet Co.*, 21 Wall. 389; *Belden vs. Chase*, 150 U. S. 674; *The Hamilton*, 207 U. S. 398.

(2) In *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, decided a few months earlier by the same five to four vote, this court held that state workmen's compensation acts could not constitutionally be applied to maritime injuries because of conflict with the maritime law, in the absence of any action by congress on the subject.

At this time, state workmen's compensation acts were very new in the field of maritime law and constituted a radical departure from the previous law. On this account they may perhaps have been viewed with distrust, when the first cases involving them came to this court. They have since become a settled portion of maritime jurisprudence by adoption in

forty-three states and by the federal government for its own employees, and no reason now exists why they should not be given full favor because of their remedial features. Their validity in their general aspects has been recognized by this court in *New York Central R. R. Co. vs. White*, 243 U. S. 188.

The Jensen decision overruled contrary decisions of lower courts in the following cases:

Kennerson vs. Thames Towboat Co., 80 Conn. 367, 94 Atl. 372;

Lindstrom vs. Mutual S. S. Co., 132 Minn. 328, 156 N. W. 669;

North Pacific S. S. Co. vs. Industrial Accident Commission, 174 Cal. 346, 163 Pac. 199;

Jensen vs. Southern Pacific Co., 215 N. Y. 514; *Keithley vs. North Pacific S. S. Co.*, 232 Fed. 255;

Bjolstad vs. Pac. Coast S. S. Co., 244 Fed. 634.

The only decision below to the contrary was *Schueder vs. Zenith S. S. Co.*, 216 Fed. 566, which this court later affirmed by an equally divided court in 244 U. S. 646.

(3) The act of October 6, 1917, was passed by congress to overcome the effect of *Southern Pacific Co. vs. Jensen*, congress deeming the welfare of the country to require the protection of maritime workers under the laws of their own states and that uniformity of federal rule was not desirable.

(4) This act, hereinafter called the 1917 act, was held unconstitutional by the same bare majority of

this court in *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, which we will discuss below.

(5) In *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263, a later decision, this court unanimously held that the state workmen's compensation act may apply without authority from congress to injuries occurring upon the wharf or dock to persons in maritime service, for the reason that admiralty jurisdiction in tort does not apply to injuries occurring upon the shore. The court might have held, as did the New York Court of Appeals in the same case, that the necessity for uniform regulation of interstate and foreign commerce by water required the application of a federal rule to all maritime service regardless of the *locus* of the injury. It can not be denied that the interference with commerce is just as great where a sailor or stevedore is injured upon the dock alongside his ship, in the course of his employment, as when he is hurt upon the vessel in the course of the same service. Under this view it would follow that failure of the maritime law to prescribe a remedy could be corrected only by act of congress prescribing a uniform federal remedy. This court did not, however, so hold. In its decision the test of applicability of a state workmen's compensation act was made not the nature of the service being performed at the time of injury or its relation to commerce and navigation, but whether the maritime law has at the time a rule of its own applicable to the situation. The decision

marked a radical change in the viewpoint of the court.

(6) In *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, another later decision, this court has again unanimously modified the viewpoint of the *Jensen* and *Knickerbocker* cases. In this case a carpenter was injured while completing the construction of a vessel. The vessel was afloat upon navigable waters after launching, but not yet in service. The court held that the case was within the jurisdiction of the admiralty courts in tort but, nevertheless, the state workmen's compensation act must be applied as the exclusive remedy, because the subject matter of the service was local in character, permitting the application of the local or municipal law. Even though the maritime law has an applicable rule the state law will nevertheless be applied where the subject does not involve interstate or foreign commerce or navigation.

In *Western Fuel Co. vs. Garcia*, 257 U. S. 233, this court also declared fatal injuries occurring upon navigable waters within the territorial limits of a state to be local in character for the purpose of a state death statute.

We claim, in the light of the last two decisions, that the regulation of personal injuries of port and harbor workers is not so closely connected with interstate and foreign commerce or navigation by water as to preclude congress from using its own judgment in determining whether the best interests of the

United States require a national regulation or application of the local law.

(7) The regulations more recently made by congress to meet *Knickerbocker Ice Co. vs. Stewart*, and the later decisions of this court just referred to, are:

(1) By Sec. 33 of the Merchant Marine Act of 1920, Act June 5, 1920, c. 256, 41 Stat. 998, sailors are placed under a uniform federal regulation, the Federal Employers' Liability Act.

(2) Port and harbor workers are impliedly declared by congress by the act of June 10, 1922, now before this court, not to be engaged in service in which uniformity of national regulation is advisable and are, accordingly, returned to the protection of the compensation laws of the states in which they have their permanent residence and carry on their work.

We have pointed out that the case of *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372; *Southern Pacific Co. vs. Jensen*, 244 U. S. 205; and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, met with a very vigorous protest from four members of the court. The case at bar can be determined narrowly upon differences between the present act and the act condemned in the *Knickerbocker Ice Co.* case. A broad and full consideration of the question, however, justifies reconsideration of some of the holdings in these three cases. Because of the closeness of the vote in this court, these decisions can not be said to

have yet become settled law in their entirety. The contrary tendency of the last two decisions referred to and the fact that four of the present members of the court were not upon the bench at the time these cases were decided, justify us, we believe, in respectfully asking for a reconsideration of the following questions covered in said cases: (1) Whether the work of longshoremen and other port and harbor workers is so closely connected with interstate and foreign commerce and navigation as to preclude the exercise of a legislative discretion by congress in determining whether federal or state regulations should better apply to them. (2) Whether the analogy of the Wilson Act, Webb-Kenyon Act, Assimilable Crimes Act, Pilotage Act and other federal statutes which make state laws applicable to matters within federal jurisdiction do not cover the situation now presented. (3) Why the 1922 act may not be upheld upon the reasoning employed to uphold state statutes in maritime matters such as pilotage acts, death statutes, statutes creating liens in its home port of the vessel, etc. (4) Why a state compensation act may not be upheld in death cases when the maritime law makes no provision whatever for fatal injuries. *The Corsair*, 145 U. S. 335.

We call to the attention of the court the dissenting opinions in the *Jensen* and *Knickerbocker* cases, which cover the points here made more clearly than the writer could hope to do.

**STATEMENT OF ELEMENTS OF PUBLIC POLICY
INVOLVED.**

Congress has determined by the act of June 10, 1922, that as to injuries sustained by port and harbor workers in the course of their work, the welfare of the country would be best met by retracting the federal jurisdiction in maritime matters and allowing the states to provide the necessary regulations. There are strong reasons supporting the wisdom of this determination. At the least, there are such grounds for reasonable divergence of opinion upon the merits of the question as to prevent ousting congress from the exercise of its legislative discretion upon the question. The grounds favoring state regulation are summarized as follows:

1. Regulation of personal injuries sustained by wharf and dock workers, supply men and repair men engaged in local maritime service, indirectly and secondarily affects navigation and commerce by water rather than directly and immediately. Such regulations do not act upon the movement of vessels or transportation of commerce, but merely determine the rights and liabilities of instrumentalities of such movement arising out of local employments. In interstate commerce by land such regulation of instrumentalities unquestionably is with the states until congress acts. *Second Employers' Liability cases*, 223 U. S. 1, 54.

2. The states have a direct interest in seeing that adequate and proper rules of law are provided for the

relief of such injuries. Their relief or redress presents primarily a local problem. Harbor and port workers are not transients like sailors but are permanent residents of the states and engaged in permanent industries carried on in the harbors of the states. Their employers are also almost invariably residents and doing business in the state, such as stevedoring companies, ship repair yards, material and supply men, etc. The workers have their homes in the state and have in the state persons depending upon them for support.

As a matter of natural justice such workers are entitled to protection for themselves and their dependents equal to that given by the laws of their state to its other industrial workers.

Employers usually desire the protection of limited recovery and speedy and inexpensive procedure given by state workmen's compensation acts in preference to the hazards and expense of litigation with unlimited recovery, involved in suits under the admiralty law. They are entitled as a matter of justice to claim the same protection of the laws of their state as are given to its other industries.

The state is entitled to have protection against its disabled workers becoming public charges and burdens upon its institutions, its public and private charities. If a stevedore is injured in the course of his employment, the maritime law does not carry him over his period of adversity. The burden falls upon the state. If he is killed, maritime law does not de-

fray the cost of support of his children and widow in public institutions or by private charities. It falls upon the state. The cost of such injuries is purely a local burden.

Assuming the federal government to have substantial interest in the proper regulation of navigation and maritime commerce, the states have a like interest in the protection of their citizens. It is proper for congress to balance the opposing interests of state and nation and to determine in its discretion which interest should receive the greater recognition.

3. A uniform federal act for longshoremen is impracticable. State laws apply to injuries occurring upon the wharf and the federal law, but for the 1922 act, to injuries occurring upon the vessel. *State Industrial Commission of N. Y. vs. Nordenholt Corporation*, 259 U. S. 263. The service or employment, however, and not the *locus* of injury, is the natural unit for jurisdiction. A longshoreman discharging cargo is rendering service in connection with the movement of maritime commerce, equally when loading his truck in the hold of the ship, when trucking his load down the gang plank, and when piling the cargo upon the wharf. The necessity for uniformity of maritime law is no greater when he goes up the gang plank than when he goes down it, when on the ship or on the wharf. The locality test of maritime jurisdiction has no relation to the need for uniform federal regulation. The water line is not a practicable point to separate the two jurisdictions.

There is an advantage to employers of labor engaged in local maritime work in having their entire liability determined under one act rather than to have a divided liability, fluctuating between state and federal laws. Defendant in error James Rolph Company, for instance, maintains docks and storage facilities in San Francisco to handle coal imported by it. Its office force, officers, bookkeepers, janitors, weighers, dock masters, deliverymen and laborers upon the wharf are wholly within state jurisdiction. Its longshoremen are within the state jurisdiction until they reach the middle of the gang plank and then would pass under the admiralty law upon entering the ship. It is more convenient for it to have its entire staff of employees, other, possibly, than members of crews of vessels, governed by the same state law than to be obliged to face proceedings under the admiralty law at one time and under the state compensation act at another. The business conducted in the port is the natural unit of jurisdiction and should be wholly under one law. The federal government can not supply a rule to cover the entire business, and the states can.

Similarly, there is a certain large sugar refining company on San Francisco Bay which imports raw sugar in vessels, discharges it at its refinery and there refines it. Its refining operations are wholly under the state law and it will be advantageous to it to have all its refinery employees, including those engaged in

the discharging of raw sugar from its boats at the refinery, classed together under the same law.

Again, it is universal today for employers of labor to protect themselves and their workers by policies of workmen's compensation insurance. If the federal government enacts a federal compensation act for stevedores injured upon vessels, it will provide some form of protective insurance. The same insurance company will not, in all probability, be able to insure under both federal and state laws in one policy for one premium. In the states of Oregon, Washington and Ohio, among others, the state itself provides the insurance and does not insure against liability under the law maritime. Employers would be required to take out one insurance policy under the state law for injuries to their longshoremen while on the dock and a separate policy of insurance under the federal law for injuries occurring to the same men engaged in the same service while in the ship. The proportion of time a given workman will be on the ship and on the wharf can not be accurately measured, nor can accidents upon the gang planks be computed actuarily to provide a fair division of hazard and premium under the two laws. The work is not divisible for the purpose of insurance at the water line. The entire service of the stevedore is the only practicable insurable unit. This requires one law for the whole service.

4. Jurisdictional conflicts will be increased if congress is compelled to provide a federal rule for port

workers. This court has had experience, in jurisdictional conflicts under the Federal Employers' Liability Act, with the question of whether a railroad employee is engaged at the moment of his injury in interstate or local commerce. Questions equally difficult will arise if the federal government be compelled to assume jurisdiction over port employees injured upon navigable waters. Questions of gang plank injuries, of local or national character of service under *Grant Smith-Porter Ship Co. vs. Rohde, supra*, of injuries in and about dry docks and repair yards, of services to vessels out of commission, etc., all present jurisdictional conflicts which congress may properly desire to avoid.

5. The preference of both employers and employees in harbor work is for uniform application of the state law to their entire employment. Following the decision in *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, stevedoring companies in San Francisco and Los Angeles harbors represented to the Industrial Accident Commission of California that they preferred the operation of the state workmen's compensation act, with its limited recovery and inexpensive procedure, to the uncertainties and costs of litigation of suits in admiralty. They requested permission to continue under the state workmen's compensation act by voluntary arrangement, offering to pay the premiums due upon workmen's compensation insurance if the insurance companies would agree to pay the benefits due under the state

law to their workmen. An arrangement of this nature was worked out and payments were continued under the state compensation act wherever the injured or his dependents would give release of rights in admiralty in consideration for the payment to him of compensation benefits. Advantages of this arrangement are (1) better labor conditions, the longshoremen being better satisfied with the protection of the state law as accorded to all other workers in the port; (2) relief from excessive costs of litigation and uncertainties of recovery; (3) economy of administration with all employees under one law.

Upon practical considerations, therefore, there are ample reasons sustaining the choice made by congress to warrant leaving the determination of the question of policy involved to the legislative discretion of congress.

The same reasons of policy apply to the second contention raised in this brief, that employers and employees, in port and harbor maritime occupations at least, should be free to adopt the provisions of an elective state workmen's compensation act as the measure of their rights and duties whenever they so desire. The uniformity of the maritime law is not offended by the voluntary adoption of a different standard of liability by the parties immediately concerned. The considerations of policy cited above show the desirability of not prohibiting employers and employees in these occupations from entering into or continuing this arrangement between themselves.

OUTLINE OF CONTENTIONS.

Our contentions are:

1. Congress may withdraw the exercise of federal jurisdiction from any portion of the field of maritime law, so as to permit the states to function in the unoccupied field under their police power. The constitution permits congress to secure uniformity of regulation of shipping by national law to the extent that congress considers it practicable to do so, but does not compel congress to provide national regulation exclusively, where congress does not consider it practicable or wise to do so. The federal jurisdiction is sufficiently vindicated by placing full power to control in congress, to be exercised by it in its discretion.
2. It has so acted in the act of June 10, 1922. This action does not constitute a delegation of legislative power, as the states in entering the field act under their police power and not under federal authority.
3. The requirement for uniformity of maritime law does not prevent congress from taking this action, under the analogy of similar situations relating to interstate commerce by land and similar state and federal statutes relating to maritime matters, such as state death statutes, the Pilotage Act, the Wilson Act, the Webb-Kenyon Act, the Assimilable Crimes Act and the Conformity Act.
4. Nothing in the maritime law prevents employers and employees in port occupations, at least, from voluntarily adopting by express or implied contract

the provisions of a state workmen's compensation act as the measure of their rights and duties.

ARGUMENT.

I.

ACT OF JUNE 10, 1922, IS CONSTITUTIONAL.

- A. THE DECISIONS OF THIS COURT IN SOUTHERN PACIFIC CO. VS. JENSEN, 244 U. S. 205, AND KNICKERBOCKER ICE CO. VS. STEWART, 253 U. S. 149, DO NOT INVALIDATE THE PRESENT ACT.

1. *Southern Pacific Co. vs. Jensen does not make the 1922 act invalid.*

In this case, the court held the New York Workmen's Compensation Act, in the absence of any congressional action upon the subject, to be inapplicable to maritime injuries generally because of conflict with the federal maritime law and the federal constitutional admiralty and maritime jurisdiction. The grounds of this decision, as we understand them, with comments upon their applicability to the 1922 act, are:

(a) *That the general maritime law is a part of the national law and includes and excludes state legislation to the same extent as an act of congress upon the subject.*

Accepting this statement, it involves no determination upon the power of congress to repeal portions of the maritime law and leave the field thus vacated to the states. In the *Jensen* case, the court was dealing with a situation in which congress had not yet acted upon the subject. Congress has now acted.

We are concerned only with its power to act. The general maritime law, comparable in this respect to the common law of the states, is no less subject to the power of repeal of congress than are its own statutes. By repealing portions of the substantive maritime law, congress has in effect made injuries sustained by port and harbor workers nonmaritime and thereby removed all possibility of conflict between the state laws and the federal jurisdiction.

(b) *That the application of the state compensation acts to foreign vessels would defeat the uniformity of federal regulation in matters national in scope which it was the object of the constitution to secure and would harm and impede freedom of commerce and navigation with foreign countries.*

The present act eliminates this objection. By excluding from its operation masters and members of crews of vessels and thereby limiting its effect to local port and harbor workers, the possibility of interference with foreign shipping becomes remote. Foreign vessels in American ports have their stevedoring performed almost wholly under contract with local stevedoring companies. They have not the facilities for supplying equipment for loading and unloading their vessels and for getting together gangs of workmen under their direct employment. The only exception is where the steamship line has its own terminal facilities in an American port, such as wharfs and docks. In this case, it is to that extent conducting a local enterprise. Its local employees

are undoubtedly under the state compensation act whenever injured upon the wharf or dock. To the extent of operation of its permanent and port facilities, it subjects itself to the municipal law in substantially all respects and is in no different position from any other local maritime enterprise.

To impose one liability in place of another upon a domestic stevedoring company, a domestic repair yard or a domestic marine supply concern, or even upon a steamship line owning its terminal facilities and having a port staff, does not interfere with the operation of foreign vessels in any field in which uniformity of federal regulation is greatly desirable. The primary object of the maritime law is to provide proper regulations for the movement of commerce by water. The regulation of the rights of port and harbor workers arising from personal injuries has no such direct relation to this movement. The exclusion of crews of vessels from the new statute takes it out of the objection of interference with foreign vessels.

Further, the statement of possible interference by the state acts with navigation invokes reference to the decisions of this court striking down or upholding state legislation upon the claim that it may amount to a regulation of interstate or foreign commerce. While these decisions were based upon federal jurisdiction under its "commerce clause" instead of the admiralty power, they become immediately applicable upon the suggestion that commerce

by land or water is being interfered with. Commerce includes navigation (*Gibbons vs. Ogden*, 9 Wheat. 1), and the power to regulate commerce includes the power to regulate maritime matters generally. *The Lottawanna*, 21 Wall. 558, 577.

Under the commerce clause, it is held that the regulation of instrumentalities of commerce is not, *per se*, a regulation of commerce itself, so that the states are free to act until congress occupies the field. *Robbins vs. Shelby Co. Taxing District*, 120 U. S. 489. This is especially true of personal injuries to persons employed in interstate commerce by land, Second *Employers' Liability* cases, 223 U. S. 1, 54, and of injuries sustained by persons employed in maritime service, *Sherlock vs. Alling*, 93 U. S. 99 (death statute); *Valley S. S. Co. vs. Wattawa*, 244 U. S. 202 (workmen's compensation act). The requirement of noninterference by the state with commerce can be no greater under the admiralty power than under the commerce power, as it is the same commerce that is being regulated in either event. Interstate and foreign commerce by land calls for no less protection than such commerce by water. The 1922 act involves no interference with foreign commerce.

(c) *That the state compensation acts are inconsistent with the policies adopted by congress for encouragement of investment in shipping.*

A later act of congress supersedes its earlier statutes so far as it may be inconsistent with them. If

there be inconsistency, the act of June 10, 1922, takes precedence.

(d) *That the remedy of the state compensation act, being novel and incapable of enforcement by the ordinary processes of any court, is not within the "saving clause."*

The act of 1922 expressly amends the "saving clause" to include state workmen's compensation acts in the situations named, so that there can no longer be any doubt of the scope of the "saving clause."

(e) *The court conceded by implication in the Jensen case that congress had the power here claimed.*

One ground of the decision is indicated in the reference by the court in the *Jensen* case to the liquor cases, *Bowman vs. Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Vance vs. Vandercook Co.*, 170 U. S. 438, and *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311. It states the rule declared in them that where the subject is national in scope, the failure of congress to provide a regulation will be construed as an implied declaration by congress that the subject shall be free from state regulation. The plain implication is that if congress affirmatively states its desire that the subject be regulated by state action, such desire will prevail. This is further reinforced by the fact that the very cases cited by the court are all cases in which it sustained the validity of acts of congress (Wilson and Webb-Kenyon acts) returning jurisdiction to the states upon a subject

matter which it had previously held to be national in character within the rule quoted above. Nothing in *Knickerbocker Ice Co. vs. Stewart* opposes this view.

2. *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, does not make the 1922 act invalid.

In this case, a bare majority of the court held unconstitutional the act of October 6, 1917, which amended the "saving clause" contained in sections 24 and 256 of the Judicial Code to save to suitors, in addition to their common law remedies, rights and remedies under the workmen's compensation act of any state. We at this point submit only the contention that the changes made by congress in the act of 1922 take it out of the objections made by the court in the *Knickerbocker* case. The grounds of this decision, as we construe them, are:

(a) *That the act of 1917 left the maritime law in full force and effect and merely provided an election on the part of the injured maritime worker to claim under the maritime law or under a state workmen's compensation act at his pleasure. Under these circumstances, congress can not delegate to the states authority to contravene the maritime law where it applies.*

That the court so interpreted the 1917 amendment is apparent from its statement (page 161, 253 U. S.) that:

"A mere reservation of partially concurrent cognizance to such courts (the state courts) by an act of congress conferring an otherwise exclusive

jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the states."

Again, the court refers, page 161, note, to the report of the senate committee upon the bill, in which it is clearly set forth that the bill was intended to give to claimants an election between the maritime or state remedies in each case. The court also states (same page) that the field was not left unoccupied by the failure of congress to provide a national statutory rule, as the law maritime was itself occupying the field.

The 1922 amendment cures this defect by making the compensation remedy the exclusive remedy where applicable. It has, therefore, repealed all provisions of the law maritime concerning personal injuries sustained by port and harbor maritime workers in states having workmen's compensation acts. The substantive law maritime is no longer in the field; no federal rule exists with which the state rule can conflict. The more recent decision of this court in *State Industrial Commission of N. Y. vs. Nordenholt Corporation*, 259 U. S. 263, reinforces this view, as the existence of a gap in the maritime law is there held sufficient to warrant the application of the state workmen's compensation act to a matter strongly of maritime concern and national in scope.

(b) The court expresses a doubt, page 159, 160-3, as to whether congress evidenced in the 1917 amendment an intention to create new substantive rights by

an amendment to a mere clause saving jurisdiction. This doubt is cured by express language in the new act, making the substantive law of the state the exclusive remedy where applicable.

(e) *That the object of the constitutional grant of maritime jurisdiction was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation and to establish as far as practicable uniform rules throughout the union. That, therefore, congress must itself supply the rule (as far as practicable) and can not delegate legislative power to the states to do so.*

We have contended above that it is not practicable to apply a uniform federal regulation to personal injuries sustained by port and harbor workers, and that congress may so determine.

The act of 1922 differs from the 1917 act in that it differentiates members of crews of vessels from port and harbor workers. The former it places under an improved federal rule (non-maritime); the latter under state law. The statute before the court in the *Knickerbocker* case applied to all maritime workers indiscriminately. By reducing the class of workers affected by the 1922 act to port workers (whose injuries upon land are under the state law anyhow), the problem is very different from that before the court in the *Knickerbocker* case. The service of port workers to whom the new act applies is not as closely connected with foreign commerce as in that case.

Congress may determine, in the exercise of its legislative power, whether uniform federal regulation is in fact desirable.

Questions raised by the opinions in the *Jensen* and *Knickerbocker* cases but not satisfactorily explained are (1) Why a state death statute can be applicable to personal injuries in all maritime employments while a state workmen's act can not be applied to stevedores' injuries; (2) Why a state workmen's compensation act may not be applied in fatal cases when the maritime law makes no provision for death cases; (3) Why any higher degree of uniformity should be required for the regulation of navigation or commerce by water than for the regulation of interstate and foreign commerce by land; (4) Why the regulation of personal injuries sustained by persons employed in maritime service should be held a direct burden upon commerce when a regulation of similar matters more closely related to commerce such as pilotage (*Cooley vs. Board of Port Wardens*, 12 How. 299), liens upon vessels in their home ports (*The Lottawanna*, 21 Wall. 558), death statutes (*The Hamilton*, 207 U. S. 398), state workmen's compensation act (*Valley S. S. Co. vs. Wattawa*, 244 U. S. 202), are held to be only incidental to and not a regulation of commerce and within the power of the states until congress acts.

B. THE ACT OF JUNE 10, 1922, IS VALID UPON THE GROUND THAT CONGRESS HAS POWER TO RETRACT THE EXERCISE OF FEDERAL MARITIME JURISDICTION AND TO REPEAL PORTIONS OF THE SUBSTANTIVE MARITIME LAW IN THE FIELD OF PERSONAL INJURIES SUSTAINED BY PORT AND HARBOR WORKERS SO THAT THE STATES MAY PRESCRIBE A REMEDY FOR SUCH INJURIES UNDER THEIR POLICE POWERS, FREED FROM CONFLICT WITH FEDERAL JURISDICTION.

Proof of Existence of This Power.

1. *Nature of state and federal powers.*

The power of the states to regulate personal injuries occurring within their borders is derived from their police power. *New York Central R. R. Co. vs. White*, 243 U. S. 188; *Wilson vs. McNamee*, 102 U. S. 572. The power of the federal government comes from the express grant of authority in the constitution to legislate upon interstate and foreign commerce and the implied grant to legislate upon matters of admiralty and maritime cognizance. Neither state nor federal government exercises any power delegated by the other. The power of each is derived independently from the same competent source. When both attempt to apply their regulation to the same subject at the same time, a conflict results which is reconciled by the provision of the federal constitution making the constitution, laws and treaties of the United States supreme under such circumstances. The fact that the federal law prevails does not prove the states incompetent. *Smith vs. Alabama*, 123 U. S. 465, 473. It only proves that the

federal regulation is superior in the event of conflict with a state regulation otherwise within the sovereign power of the state.

This is well illustrated in the following quotation from Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat. 1, 194:

"So, if a state in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means."

Again at page 210:

"* * * it has been contended that if a law passed by a state, in the exercise of its acknowledged sovereignty comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself but of the laws made in pursuance of it, * * *. In every such case, the act of congress, or the treaty, is supreme; and the case of the state, though enacted in the exercise of powers not controverted, must yield to it."

2. *It is not the existence of a power in the federal government but its exercise which bars state action.*

In *Sturges vs. Crowninshield*, 4 Wheat. 122, this

court through Chief Justice Marshall said, speaking of bankruptcy laws, which are expressly required by the constitution to be uniform:

“If this be correct, it is obvious that much inconvenience would result from that construction of the constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to congress. It may be thought more convenient that much of it should be regulated by state legislation, and *congress may purposely omit to provide for many cases to which their power extends.* It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the union may not reach. But be this as it may, *the power granted to congress may be exercised or declined as the wisdom of that body shall decide.* If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.” (Italics ours.)

Speaking especially of admiralty law and navigation, this court stated in *Cooley vs. Board of Port Wardens*, 12 How. 299, 318, with reference to pilotage:

“* * * that, it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states and that the states may legislate in the absence of congressional regulations.”

In *Butler vs. Boston, etc., S. S. Co.*, 130 U. S. 527, it holds, speaking through Mr. Justice Bradley:

“It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and can not be affected or controlled by legislation, whether state or national. * * * But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as congress may from time to time have adopted.”

In *Gilman vs. Philadelphia*, 3 Wall. 713, 724:

“Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States.
* * *

It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.”

3. Since congress may omit to exercise the full national power, it may with equal propriety withdraw a power previously exercised, either statutory

or unwritten in character. It has done so with the approval of this court in the following cases.

In *Gibbons vs. Ogden*, 9 Wheat. 1, this court sustained by way of argument the constitutionality of acts of congress of 1792 and 1794, directing federal officers to conform to and aid in the execution of the quarantine and health laws of the states, notwithstanding resulting interference with commerce and navigation.

In *Cooley vs. Board of Port Wardens*, 12 How. 299, this court sustained an act of congress providing that pilotage, a matter intimately associated with navigation and maritime law, should continue to be governed by state regulations. (In both these cases, congress withdrew the exercise of federal jurisdiction from a field involving interstate commerce, or navigation, or both. Congress can not change the scope of the constitutional grant of power. It can not exercise powers not given it by the constitution or preclude itself from resuming the exercise of powers conferred. But within the limits of the constitutional grant, it may exercise or decline to exercise the granted powers in its discretion.)

In *In re Rahrer*, 140 U. S. 545, this court sustained the constitutionality of the Wilson Act, which provided that all intoxicating liquors transported into any state shall upon arrival become subject to the laws of the states. In so doing, congress set aside the previous decision of this court in *Leisy vs. Hardin*, 135 U. S. 100, holding that the regulation of imports

of intoxicating liquors into the different states was a regulation of interstate commerce, which the states could not exercise, the silence of congress being equivalent to its declaration that the subject matter should remain free.

In *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311, this court sustained the constitutionality of the Webb-Kenyon Act, which prohibited the importation of liquors into states where prohibited by the laws of the state.

4. In general, congress possesses paramount power to fix and determine the maritime law, this power including the power of repeal.

In re Garnett, 141 U. S. 1, 12; *The Lottawanna*, 21 Wall. 558, 577; *Butler vs. Boston S. S. Co.*, 130 U. S. 527; *Southern Pacific Co. vs. Jensen*, 244 U. S. 205.

RETRACTION OF THE FEDERAL MARITIME JURISDICTION INVOLVES NO DELEGATION OF LEGISLATIVE POWERS TO THE STATES.

In the *Knickerbocker Ice Co.* case, this court suggests that the 1917 act of congress involved a delegation of legislative power to the states. The court was there speaking of a statute in which the maritime law was stated to have been left in the field but claimants were authorized to elect between a claim under the state workmen's compensation act or the maritime law. This indirectly gave to the states the power to supersede applicable rules of the maritime law by their own statutes. This situation does not exist in the present case. By the 1922 act, state workmen's compensation acts are made exclusive where applicable. In states having such acts, there is no maritime law to conflict with the state statute. Where the state can make its rules applicable to maritime matters, it does so under its own police power and not through the grant of any authority from congress to legislate, as pointed out above.

CONGRESS IS NOT PROHIBITED FROM LEAVING THE FIELD OF REGULATION OF PERSONAL INJURIES OF PORT WORKERS OPEN TO STATE ACTION BY REASON OF ANY INTERFERENCE WITH INTERSTATE AND FOREIGN COMMERCE.

In the *Jensen* and *Knickerbocker* cases, this court refers to possible interference with maritime interstate and foreign commerce by the regulation of personal injuries in maritime service by state compensation acts. We have referred to this contention briefly in our preceding discussion of the *Jensen* case. The necessity for freeing interstate and foreign commerce from state created burdens, greater or less as the case may be, is no greater for water commerce than for land commerce. The nature of the commerce and the extent of interference with it is the same whether it move by water or rail. Cases defining permissible interference under the commerce clause by the states in the aid of their local weal are therefore equally applicable to commerce by water as far as the question of permissible interference is concerned.

We are not here concerned with questions of domestic commerce. This court has held that a uniform rule is only required for maritime matters to the extent that interstate or foreign commerce may be involved. *Southern Pacific Co. vs. Jensen, supra.* Domestic commerce by water presents a local problem, to which admiralty jurisdiction may extend, but in which the state may legislate until congress acts. *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S.

469; *Western Fuel Co. vs. Garcia*, 257 U. S. 233; *The Minnesota Rate cases*, 230 U. S. 352; *Manchester vs. Mass.*, 139 U. S. 240; *Wilmington Transp. Co. vs. Calif. R. R. Comm.*, 236 U. S. 151.

It is well settled by the decisions of this court that incidental regulations by the states of matters involving their own security or the welfare of their citizens are not void, even in the absence of action by congress, because they may incidentally affect interstate or foreign commerce. *The Minnesota Rate cases*, 230 U. S. 352.

In *Sherlock vs. Alling*, 93 U. S. 99, 103, this court held:

“And in the application of the principle it makes no difference where the injury complained of occurred in the state, *whether on land or on water*. General legislation of this kind (death statute) prescribing the liabilities or duties of citizens of a state without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. * * *

“In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution. * * *

“* * * and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, *whether on land or water*, or engaged in commerce, foreign or interstate, or in any other pursuit.” (Italics ours.)

In the field of interstate commerce, it is established that the regulation of personal injuries sustained by employees working at the time in interstate or foreign commerce is within the power of the states until congress acts. Second *Employers Liability* cases, 223 U. S. 1, 54. See also *Hull vs. De Cuir*, 95 U. S. 485; *Huus vs. New York, etc., S. S. Co.*, 182 U. S. 392; *Nashville, etc., Ry. vs. Alabama*, 128 U. S. 96; *Vandalia R. R. Co. vs. Public Service Comm.*, 242 U. S. 255; *Hennington vs. Georgia*, 163 U. S. 299.

In *Valley S. S. Co. vs. Wattawa*, 244 U. S. 202, this court, through Mr. Justice McReynolds, sustained the application of a state workmen's compensation act to the injury of a deck hand occurring on board a vessel as against the claim of interference with commerce under the commerce clause. This decision alone would seem to dispose of the contention of interference with commerce by state compensation acts under the 1922 act of congress.

**THE ACT IS NOT VOID FOR ONE OF UNIFORM
OPERATION.**

The objection is urged in one decision below upon this question (*The Canadian Farmer*, 290 Fed. 601), that the act of June 10, 1922, is void because it does not prescribe the same rule in every state, *i. e.*, that congress can neither provide a different rule for each state depending upon the different state laws nor provide that the state workmen's compensation acts shall govern in such states as have compensation acts and the law maritime in other states.

The law maritime is notoriously incomplete. It contains no provisions for injuries occurring upon land to persons performing maritime service. It contains no provision for fatal injuries. It contains none of the statutory improvements and ameliorations provided by state employers' liability or workmen's compensation statutes or by the federal employers' liability act. To meet this situation, congress chose to permit the improved laws of the states to govern where the states had modern legislation upon the subject, *i. e.*, state workmen's compensation acts. In states not possessing such acts, the law maritime was presumed to give as good a remedy as that provided by state laws and was, therefore, retained.

Congress had jurisdiction to so determine. We are not concerned with the wisdom of this action of congress but only with its power to act. *Hamilton*

vs. *Ky. Distillery Co.*, 251 U. S. 146, 161; *Lottery* cases, 188 U. S. 321, 363.

(a) The constitution contains no express requirement for uniformity of federal laws except in special cases, as in the following quoted provisions:

“To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.” (Art. I, Sec. 8, subdivision 4.)

“But all duties, imposts and excises shall be uniform throughout the United States.” (Art. I, Sec. 8, subdivision 1.)

The making of specific requirements for uniformity in certain cases excludes such requirement in the remaining cases, of which the express power to regulate power and the implied power to fix and determine the maritime law are included. *Inclusio unus exclusio alterius*. The constitution does not itself require uniformity in the latter case. It leaves the matter to the discretion of congress, after conferring upon it full authority to act.

(b) Congress has regularly exercised the power of making different requirements in different states, depending upon the laws of the states, with the invariable approval of this court where a question has been raised.

The Pilotage Act (act of congress of August 7, 1794, 2 Laws U. S. C. 9, Sec. 4) declared that pilotage in the ports of United States shall be regulated by state laws. Naturally different states have different

laws and some may have no statutory provision on the subject. The validity of this statute has been upheld in many cases including *Hobart vs. Drogan*, 10 Pet. 108; *The China vs. Walsh*, 7 Wall. 53; *Cooley vs. Board of Port Wardens*, 12 How. 299; *Gilman vs. Philadelphia*, 3 Wall. 713, 714.

The Wilson and Webb-Kenyon acts, referred to above, provide in effect that such states as have prohibitory laws may interfere with interstate commerce in intoxicating liquors, and for all other states the traffic in such liquors is free from regulation.

The Assimilative Crimes Act provides that the criminal laws of the states shall, in the absence of a federal regulation, apply and be enforced by the federal courts over crimes committed in federal districts, forts, etc. This act was sustained in *U. S. vs. Press Publishing Co.*, 219 U. S. 1, 9.

The Conformity Act provides that the procedure of the United States district courts in cases at law shall be governed by the statutes of the state in which the court is held. It was sustained in *Amy vs. Watertown*, 130 U. S. 301, and other cases.

The acts of congress of 1796 and 1797 directed federal officers to conform to and enforce state quarantine laws. It was sustained by way of argument in *Gibbons vs. Ogden*, 9 Wheat. 1.

Similarly the fact that some state statutes may give a lien upon vessels in their home ports and others not, so that the admiralty rule will be different in different states, is held not to bar such legislation.

The General Smith, 4 Wheat. 438; *The Lottawanna*, 21 Wall. 558. The fact that some states may have death statutes and others none and that the death statutes may differ in different states does not prevent their application in maritime cases. *Sherlock vs. Alling*, 93 U. S. 99.

The constitution therefore does not make uniformity compulsory.

THE 1922 ACT IS IN FACT OF UNIFORM APPLICATION.

The Wilson Act, surrendering jurisdiction over interstate commerce in alcoholic liquors in such states as have state prohibitory laws, presents a parallel situation. This court in *In re Rahrer*, 140 U. S. 545, held the Wilson Act to be of uniform application, saying:

“It (congress) has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.”

In *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, this court commented upon the Webb-Kenyon Act to the same effect, saying:

“It is true the regulations which the Webb-Kenyon act contains, permit state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of congress, *i. e.* congress itself forbade shipments of a designated character.”

See also *The Aurora*, 7 Cranch, 382;

There is no difference between returning to the states the power to apply their own divergent laws in the cases cited above and the power here exerted, to return to the states the power to apply their state workmen's compensation acts in states having such acts.

THE ACT IS NOT VOID BECAUSE IT LIMITS THE JURISDICTION OF THE FEDERAL ADMIRALTY COURTS.

It is contended by Judge Ervin, D. J., in *Farrel vs. Waterman S. S. Co.*, 286 Fed. 284; 291 Fed. 604, that the grant of admiralty jurisdiction to the federal courts comes from the constitution direct and that congress can not modify or take away from such courts their power to determine longshoremen's injuries. On the other hand, Judge Groner, D. J., has decided in *Carr vs. S. S. Sarland*, I American Maritime Cases 158, that the jurisdiction of the United States district courts is statutory and that they can have no jurisdiction not expressly given them by congress.

This question is not strictly before the court as it would not avoid the 1922 act in the cases now before this court to hold that the state workmen's compensation act may be enforced by proceedings in admiralty as well as before state courts and commissions. *In re Garnett*, 141 U. S. 1. The question is, however, worthy of further consideration.

If congress has the power to repeal portions of the substantive maritime law, it would seem to follow

that it could deprive the district courts of jurisdiction in those cases in which the substantive maritime law is repealed. The jurisdiction of the federal courts in admiralty is not based upon the maritime character of the subject matter or locality but upon the existence of a substantive maritime law which the court can enforce. *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263; *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469. If there be a hiatus in the law maritime, there is nothing upon which the maritime courts can act.

Passing this question, it is well established by the authorities that the inferior federal courts can exercise no jurisdiction not conferred upon them by specific acts of congress and that congress is not compelled to confer the entire judicial power of the United States upon the courts created by it. The jurisdiction of the inferior federal courts is statutory only.

(1) The "saving clause" contained in Secs. 24 and 256, Judicial Code, is complete proof of this. By it, congress has given to the state courts concurrent jurisdiction over all maritime matters except proceedings *in rem* and prize cases. If the federal constitution confers *exclusive* jurisdiction upon the federal courts in admiralty matters, the state courts have been exercising an illegal jurisdiction for one hundred thirty-four years. The constitutionality of the "saving clause" has been upheld by this court many

times, including *Schoonmaker vs. Gilmore*, 102 U. S. 118.

(2) After *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, *supra*, Rohde's claim was treated as relegated to the state industrial commission in 217 Pac. 267, following the decision of this court.

(3) In *Kline vs. Burke Const. Co.*, 43 S. Ct. 79, it is stated:

“Only jurisdiction of the supreme court is derived directly from the constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the constitution. *Turner vs. Bank of North America*, 4 Dall. 8, 19; *U. S. vs. Hudson and Goodwin*, 7 Cranch. 32; *Sheldon vs. Sill*, 8 How. 441, 448; *Stevenson vs. Fain*, 195 U. S. 165. The constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of congress to confer it. *The Mayor vs. Cooper*, 6 Wall. 247, 252. And the jurisdiction, having conferred may, at the will of congress, be taken away in whole or in part * * *.”

In *Sheldon vs. Sill*, 8 How. 441, 443, it is held:

“Courts (federal) created by statute have no jurisdiction except such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred upon another or withheld from all.”

To the same effect see

- The Mayor vs. Cooper*, 6 Wall. 247;
U. S. vs. Bevans, 3 Wheat. 336;
U. S. vs. Hudson, 7 Cranch. 32;
McIntyre vs. Wood, 7 Cranch. 504;
The Assessor vs. Osborns, 9 Wall. 567;
Stevenson vs. Fain, 195 U. S. 165;
Kentucky vs. Powers, 201 U. S. 1;
Ex parte Wisner, 203 U. S. 449.

This doctrine is specifically sustained in maritime matters in *U. S. vs. Bevans*, 3 Wheat. 336. This court there held that the grant by the constitution of jurisdiction on admiralty and maritime matters to the United States courts was not sufficient to vest the court with jurisdiction over the offense there involved (committed on a United States warship upon navigable waters in Massachusetts) because congress had not conferred it upon any particular court in that case. See also *Manchester vs. Mass.*, 139 U. S. 240, and cases there cited.

The court in *Farrel vs. Waterman S. S. Co.* bases its decision upon the authority of no decided cases other than *Southern Pacific Co. vs. Jensen* and *Knickerbocker Ice Co. vs. Stewart*, neither of which touch this phase of the question. In construing the constitution, Judge Ervin lays stress upon the word "all" contained in the grant of jurisdiction over "all cases of admiralty or maritime jurisdiction." The word "all" in the grant is intended, however, to permit congress to take over the whole field in its discretion, and not to provide that congress can not leave

some portion of the field undisposed of if it so desires. The provision has had this uniform construction in decisions sustaining the validity of the "saving clause" by which congress leaves a considerable jurisdiction in maritime matters to the states. *U. S. vs. Bevans, supra*, also rules squarely against this construction.

If the word "all" has the effect contended for, it should have the same effect in the parallel grants contained in Sec. 2, Art III of the constitution as, for instance, "to all cases in law and equity arising under this constitution, the laws of United States and treaties made," etc.; and "to all cases affecting ambassadors, other public ministers and consuls." We know, however, that state courts uniformly determine questions arising under the constitution, laws and treaties of the United States. In *Knickerbocker Ice Co. vs. Stewart, supra*, it is said:

"Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duties so require. Const. Art. VI, Cl. 2; Second *Employers' Liability* cases, 223 U. S. 1."

Ambassadors, ministers and consuls may also be authorized by congress to sue in state courts. *Bors vs. Preston*, 111 U. S. 252; *Wilcox vs. Luco*, 118 Cal. R. 639, 45 Pac. 676. The word "all" is, therefore, a word of grant, not a word of limitation.

C. THE VALIDITY OF THE ACT IS SUSTAINED UPON THE GROUND THAT THERE IS A REASONABLE BASIS FOR DIVISION OF OPINION AS TO WHETHER THE PUBLIC WELFARE REQUIRES THE APPLICATION OF A FEDERAL RULE TO THE RELIEF OF PERSONAL INJURIES SUSTAINED BY PORT AND HARBOR WORKERS. THE DETERMINATION OF THIS QUESTION IS WITHIN THE LEGISLATIVE POWER OF CONGRESS.

Whether the public welfare would be most advantaged in the particular case by a uniform federal rule or by the rules of the states in which they reside is in the last analysis a question of sound judgment, public policy and legislative discretion. Being founded upon considerations of fact, it is primarily a legislative, not a judicial question. *Until Knickerbocker Ice Co. vs. Stewart, this court in considering the necessity for conformity went no further than to construe the effect of the silence of congress in determining its intention to leave the subject matter to the state or not.* The *Knickerbocker* case holds only that congress can not leave the maritime law in the field and at the same time authorize the states to give a concurrent legislative remedy, and does not hold that congress may not declare and determine the policy in a case freed from this complication. In all cases decided by this court involving the question, except as possibly *Knickerbocker Ice Co. vs. Stewart*, the determination of congress is accepted as controlling (cases involving Wilson Act, Webb-Kenyon Act, Pilotage Act and other statutes referred to above).

In general, the power is in congress and not the courts to determine questions of policy and expediency, of fact, and of the desirability of governmental action. U. S. Const. Art. I. The courts may not pass upon the necessity for the exercise of a power possessed. *Lottery* case, 188 U. S. 321, 363; *Johnson vs. Gearlds*, 234 U. S. 422. The discretion is vested in congress to determine whether to apply a uniform federal law to matters involving interstate and foreign commerce or to leave the matter to the states. Second *Federal Employers' Liability* cases, 223 U. S. 1, 51. If modification be needed of the previous law, the power is placed in congress, not the courts. *Ouachita Packet Co. vs. Aiken*, 121 U. S. 444, 448.

The question here involved as to whether regulation of longshoremen's injury can be better handled by the nation or the states partakes largely of a political question as it involves a conflict between sovereign political organizations. Upon political questions, the judgment of congress is always accepted as final. *Luther vs. Borden*, 7 How. 1. The distribution of powers between state and federal governments, where the question depends upon considerations of public welfare and balancing of interests as distinguished from a pure question of construction of constitutional language, involves some elements of a political question.

If it be considered that the matter be not wholly within the legislative discretion of congress, it is at least true that any declaration by congress upon a

question of public policy, or construing the constitution in the light of such question of public policy, is entitled to great weight. *The Genesee Chief*, 12 How. 443; *Cooley vs. Board of Port Wardens*, 12 How. 299; *West River Bridge Co. vs. Dix*, 6 How. 507; *Briscoe vs. Bank of Ky.*, 11 Pet. 257; *McCulloch vs. Maryland*, 4 Wheat. 316.

If the judgment of congress be of advisory force only, it is nevertheless true that there are sound considerations of public policy supporting the determination it has in fact made. We pointed out in an opening portion of this brief the following matters:

1. While the federal government is interested in shipping and transportation of commerce by water, the states are likewise interested in the protection of their resident workers against industrial injuries.
2. The burden of poverty resulting from industrial injuries falls wholly upon the state, not upon the federal government. It is a local burden purely.
3. A port worker is entitled to the same protection for himself and family as that given by the municipal law to other workers. The employer is entitled to a modern law suitable to his interests, particularly one giving limited recovery, simple and inexpensive procedure and adequate insurance as a workmen's compensation act, now supplied by the states, for their other industries.
4. Application of a federal act to injuries sustained by shore workers upon vessels is impracticable as the water line is not a proper dividing line between

maritime and local law. The service rendered is the natural unit of jurisdiction, not the locality of the injury.

THE BURDEN OF A STATE COMPENSATION ACT IS NO MORE ONEROUS THAN THAT IMPOSED BY THE LAWS PREVIOUSLY APPLICABLE.

The majority of the court in opinions in the *Jensen* and *Knickerbocker* cases stated that the New York Workmen's Compensation Act would impose upon interstate and foreign shipping a novel and onerous burden. We respectfully submit that the further acquaintance of this court with workmen's compensation matters in cases coming before them, subsequent to the two mentioned, should disclose to the court that this was a misapprehension, the burden, in reality, at least under the act of June 10, 1922, being no greater than that imposed by the common law.

State workmen's compensation acts are enforced by ordinary proceeding *in personam* of the same general nature as that employed in courts. The procedure is less burdensome than that employed in ordinary litigation because of the quickness and inexpensiveness of trial before industrial accident boards and commissions. The proceeding culminates in a money judgment like that of any court enforceable by ordinary process *in personam*. It is true that awards of workmen's compensation benefits are usually for weekly sums instead of in a cash payment, but workmen's compensation acts invariably

contain provisions, similar to Sec. 28 of the California Act, providing for commutation of weekly payments to a lump sum wherever convenient to the parties requiring this action. There is, therefore, nothing in the provisions of such acts defining the liability, which is any more burdensome than an action and decree in the admiralty courts or an action at law for damages in the state courts under the "saving clause."

The court in the earlier cases referred to a collateral provision common to many compensation acts requiring the employer to secure the payment of compensation to his injured workmen by either taking out workmen's compensation insurance in an approved company or depositing securities with the state. Certain penalties are provided if neither course be taken. This is a collateral provision not involving the validity of the main act. If void, it may be so declared in the proper case arising on appeal from imposition of such penalties without affecting the question here involved.

To say the least, such provision for giving security for the meeting of obligations is one which a state may reasonably impose. It is no hardship to a maritime employer to require him to protect himself by insurance against liability. It is a hardship to his employees and the state if he do business within the state without giving such protection or proof of financial responsibility.

We again remind the court that the act of June 10, 1922, by eliminating masters and members of crews of vessels, almost wholly eliminates direct proceedings against foreign vessels. Defendants in claims for workmen's compensation benefits will be almost wholly local employers or firms permanently engaged in business in the home port.

**D. THE VALIDITY OF THE ACT IS UPHELD BY CASES
IN WHICH THIS COURT HAS SUSTAINED THE
APPLICATION OF OTHER STATE STATUTES TO
MARITIME MATTERS.**

The application of a local rule to maritime and equivalent matters has been sustained by this court in

- (1) Application of state death statutes, *American Steamboat Co. vs. Chace*, 16 Wall. 522; *Sherlock vs. Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.
- (2) The creation by state statutes of maritime liens upon vessels in their home ports, *The Lorraine*, 21 Wall. 558; *Peyroux vs. Howard*, 7 Pet. 324; *The J. E. Rumbell*, 148 U. S. 1.
- (3) The regulation of harbor pilotage by state statutes, *Ex parte McNeil*, 13 Wall. 236; *Anderson vs. Pacific Coast S. S. Co.*, 225 U. S. 187.
- (4) State statutes regulating wharfage service, *Ouachita Packet Co. vs. Aiken*, 121 U. S. 444.
- (5) State quarantine laws, *Morgan Steamship Co. vs. Louisiana Bd. of Health*, 118 U. S. 455.

(6) Regulation of interstate ferries, *Port Richmond Ferry vs. Hudson Co.*, 234 U. S. 317.

(7) State prohibitory acts interfering with interstate commerce in alcoholic liquor. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311.

(8) Regulation of injuries sustained in the movement of interstate and foreign commerce by rail. Second *Employers' Liability* cases, 223 U. S. 1.

These situations are all comparable to the regulation of injuries sustained by port and harbor employees in local maritime service by state workmen's compensation acts. Uniformity of federal legislation is of no greater importance in the latter case than in the cases cited as the interference with interstate and foreign commerce is about equal in all and the interest of the states in the protection of their own people and local interests is also equal.

E. THE VALIDITY OF THE ACT IS SUSTAINED BY DECISIONS OF THIS COURT UPHOLDING THE VALIDITY OF THE PILOTAGE ACTS, WILSON ACT AND WEBB-KENYON ACT.

The substance of this contention has heretofore been made in other connections and it is not necessary to do more here than to state the point. In the pilotage acts, congress provided in 1794 that the regulation of pilots conducting interstate and foreign vessels in and out of the ports and harbors of the United States should continue to be regulated by state laws. The circumstances under which pilots

are employed, regulation of their duties and payment for their services, is more closely connected with commerce and navigation by water than regulation of injuries sustained by port and harbor workers. The pilotage acts have been held valid by this court in many cases including *Cooley vs. Board of Port Wardens*, 12 How. 299; *Hobart vs. Drogan*, 10 Pet. 108, and *Ex parte McNeil*, 13 Wall. 236.

The Wilson Act permitted the states to interfere with the movement of certain interstate commodities before the goods have become mingled with the general body of goods in the state. This identical situation was one which this court in *Leisy vs. Hardin*, 135 U. S. 100, had previously held to be a matter national in scope, forbidding regulation by the states in the silence of congress. Interference with the movement itself of interstate commodities is far more directly a matter of national concern than the regulation of rights of persons employed in such commerce arising out of injuries sustained in the course of their work. The validity of this act was upheld in *In re Rahrer*, 140 U. S. 545; *Rhodes vs. Iowa*, 170 U. S. 412, and *Vance vs. W. A. Vandercook Co.*, 170 U. S. 438.

The Webb-Kenyon Act went further and divested intoxicating liquors of all interstate character, so that states having prohibitory laws could wholly stop interstate commerce in such liquors. It was held constitutional in *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311.

We respectfully submit that there is no difference in principle between the three statutes mentioned and the act now before the court.

F. THE VALIDITY OF THE ACT IS SUSTAINED BY REFERENCE TO PARALLEL SITUATIONS ARISING UNDER THE COMMERCE CLAUSE.

The purpose of the grant of jurisdiction of admiralty and maritime causes to the federal government was to secure to the congress power to make such uniform federal regulation of commerce by water as it may see fit to exercise. Ships are of no value to the law as such but only as instrumentalities for the movement of commerce by water. This court recognized in the *Jensen* case that the expedition of commerce was the root of the entire question. We quote:

“And plainly we think no such legislation (state) is valid if it * * * interferes with the proper harmony and uniformity of that law *in its international and interstate relations*.

“The necessary consequence would be destruction of the very uniformity with respect to maritime matters which the constitution shall design to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to *commerce* * * *. (Italics ours.)

Southern Pacific Co. vs. Jensen, 244 U. S. 205.

It is also well established that the power in congress to regulate commerce includes the power to

regulate commerce by water and navigation. Commerce includes navigation.

Henderson vs. Mayor of New York, 92 U. S. 259; *Lord vs. S. S. Co.*, 102 U. S. 541; *Gibbons vs. Ogden*, 9 Wheat. 1, 190; *S. S. Co. vs. Joliffe*, 2 Wall. 450; *Gilman vs. Philadelphia*, 3 Wall. 713, 724.

Without repeating what has been said before, it is apparent that parallel situations relative to interference by the states with interstate commerce by land constitute authority in the present case.

As pointed out, the regulation of personal injuries sustained by persons employed in interstate commerce is within the state jurisdiction until congress acts. *Second Employers' Liability cases*, 223 U. S. 1.

The states are not precluded by the possibility of interference with interstate and foreign commerce from enacting legislation for the health, safety and general welfare of their citizens, though it may incidentally affect such commerce, unless their legislation conflicts with an act of congress. *Robbins vs. Shelby County Taxing District, supra*; *Sherlock vs. Alling*, 93 U. S. 99. The present case is within these holdings.

**G. THE ACT IS VALID AS TO DEATH CASES, OF WHICH
THE PRESENT IS ONE, INDEPENDENTLY OF ALL
OTHER CONSIDERATIONS.**

The law maritime provides no remedy for injuries resulting in death. *American Steamboat Co. vs. Chace*, 16 Wall. 522; *The Harrisburg*, 119 U. S. 199; *The Corsair*, 145 U. S. 335.

Where the admiralty law contains no provision upon the subject, there is nothing with which state legislation can conflict and state statutes upon the subject are valid, regardless of the maritime nature of the situation. *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263; *American Steamboat Co. vs. Chace*, 16 Wall. 522.

The case at bar is one of fatal injury. The act of congress should be held constitutional in this case, regardless of all other considerations.

CONCLUSION.

We respectfully submit that the act of June 10, 1922, should be held constitutional for the following reasons:

(1) Congress has power to retract the admiralty and maritime jurisdiction to permit the states to care for injuries sustained by their citizens and residents in port and harbor maritime work.

(2) While the federal government is interested in shipping, the states are also interested in the protection of their local workers and the protection of the essential interests of the states against harm through disabling injuries sustained by their residents in the course of local employments. Congress may in its discretion recognize and balance the interests of the state and national government and declare that the necessity for uniformity of federal law does not extend to the situation here involved.

(3) The basis of the exclusion of state workmen's compensation acts in the *Jensen* and *Knickerbocker* cases must be in one or more of the following considerations, all of which are overcome by the new act.

(a) That the silence of congress, in view of the national interests involved, should be construed as a prohibition upon the states. Congress has now spoken.

(b) That the original "saving clause" and the 1917 amendments do not include the creation of substantive rights or authorize their creation by the

states. Congress has now expressly authorized their creation.

(c) That congress can not allow the substantive maritime law, as part of the law of the United States, to continue to occupy the field and at the same time authorize the states to provide an optional remedy conflicting with it. Congress has now made the state remedy exclusive where applicable, so that all possibility of conflict is removed.

(d) That the grant to the federal government of jurisdiction in maritime matters was made for the purpose of securing uniformity of regulations as far as practicable by national law, and congress can not disturb that uniformity. Answer (1) such uniformity is not practicable in this class of cases. (2) The power to determine its practicability in a particular case is a legislative and not a judicial function. (3) The constitution does not make uniformity mandatory; it instead gives congress full authority to secure it wherever in the judgment of congress it should be secured. The national interests are sufficiently protected by leaving the power to congress to be exercised in its discretion. The contention of defendant in error would call upon this court to supervise the exercise of discretion by congress upon question of fact and policy.

II.

**THE GENERAL MARITIME LAW DOES NOT FORBID
APPLICATION OF A STATE WORKMEN'S COMPEN-
SATION ACT TO MARITIME OR SEMI-MARITIME
INJURIOUS WHERE SUCH STATE STATUTE IS AN
ELECTIVE ACT.**

Workmen's compensation acts are of two general types, compulsory and elective. A compulsory act is one in which the state by its legislative power prescribes unconditionally the measure of liability of employers within the terms of the act. Of such type is the Workmen's Compensation Act of New York which forms the basis of this court's decision in *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, sustained against general objections by this court in *New York Central R. Co. vs. White*, 243 U. S. 188. Elective workmen's compensation acts, on the other hand, are such as are made applicable to a particular employment only by the express or implied contract of the employer and his employees, agreeing to adopt the measure of such statute as the measure of their rights and liabilities. In the event such act is not adopted by the parties in each case, they remain subject to the older law. The validity of such act was sustained by this court in *Hawkins vs. Bleakley*, 243 U. S. 210. The contractual nature of such act is well explained in *Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, and *Berry vs. Donovan & Sons* (Me. 1921), 115 Atl. 250. The theory of liability

under an elective statute is that the obligation is contractual, the parties having adopted as an implied portion of the terms of their contract of hire the statute of the state and the suit for workmen's compensation benefits being a suit upon contract.

The Workmen's Compensation Act of California here involved is both compulsory and elective. It is compulsory as to industrial occupations generally, as defined therein, and elective as to farm labor, household domestic service, casual employment, and all other employments not otherwise within its provisions (sections 7, 8, 70). The mode of election is prescribed in section 70, reprinted in the margin. One of the modes of election provided is the act of

SEC. 70. (a) Any employer, having in his employment any employee not included within the term "employee" as defined by section eight of this act or not entitled to compensation under this act, and any such employee, may, by their joint election, elect to come under the compensation provisions of this act in the manner hereinafter provided.

(b) Such election on the part of the employer shall be made by filing with the commission a written statement to the effect that he accepts the compensation provisions of this act, which, when filed, shall operate, within the meaning of section six of this act, to subject him to the compensation provisions thereof, and of all acts amendatory thereof, for the term of one year from the date of filing, and thereafter without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or succeeding year, file in the office of the commission a notice in writing that he withdraws his election. Such acceptance shall be held to include employees whose employment is both casual and not in the course of the trade, business, profession or occupation of the employer, unless expressly excluded therefrom. *In case any employer is insured against liability for compensation under this act, he shall be deemed to have so elected during the period that such policy shall remain in force, without filing such written notice with the commission, as to all classes of employees covered by such policy of insurance, anything in this act to the contrary notwithstanding.*

(c) Any employee in the service of any employer who has made an election in either of the modes above prescribed, shall be deemed to have accepted, and shall, within the meaning of section six of this act, be subject to the compensation provisions of this act, and of any act amendatory thereof, if, at the time of the injury for which liability is claimed:

(1) The employer charged with such liability is subject to the compensation provisions of this act, whether the employee has actual notice thereof or not; and

the employer in taking out a policy of workmen's compensation insurance.

In the present case defendant in error James Rolph Company applied for and received from defendant in error General Accident, Fire and Life Insurance Company a policy of workmen's compensation covering all its operations. The Supreme Court of California has impliedly determined that such act would constitute the election prescribed by the statute except for the bar of the federal law maritime. The court said in this connection, in *Zurich General Accident and Liability Insurance Company vs. National Accident Commission*, 218 Pac. 563, this holding being incorporated by reference in the decision in the case at bar and the insurance policies in the two cases being identical in scope:

“Assuming that the act of taking out such a policy of insurance ordinarily may have the effect

(2) Such employee shall not, at the time of entering into the employment, have given to his employer notice in writing that he elects not to be subject to the compensation provisions of this act; or, in the event that such employment was entered into in advance of the election by the employer, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices, shall have remained in the service of such employer for five days after the employer has filed his election, in which case, the time at which the employee becomes subject to said compensation provisions shall be deemed to be at the beginning of said period.

(d) The state, and all political or other subdivisions thereof, as defined in section seven, and all state institutions, shall be conclusively presumed to have elected to come within the provisions of this act as to all employments otherwise excluded from this act.

(e) All written acceptances filed by employers with the commission prior to the taking effect of this act, accepting the provisions of the workmen's compensation, insurance and safety act, chapter one hundred seventy-six, statutes of 1913, and all acts amendatory thereof, shall, unless written notice be given to the contrary by said employer within sixty days after the taking effect of this act, be deemed acceptances of the provisions of this act, and all acts amendatory thereof, in accordance with the provisions of this section. (Italics ours.)

of bringing the employer under the workmen's compensation provisions of this act, as provided, it can not of itself confer jurisdiction upon the commission, where, as in this case, exclusive jurisdiction of the matter in controversy is vested in the admiralty courts."

It, therefore, appears that the decision below did not turn upon any question of construction or application of the state statute, or of its validity under the state constitution, but that, instead, the decision against petitioners was turned wholly upon the federal question involved.

We respectfully submit that the lower court erred in its determination of this federal question for the following reasons:

(1) The maritime law does not prohibit the parties voluntarily adopting by election the provisions of a state workmen's compensation act as part of the terms of their contract of hire.

(2) The obligation being contractual and the contract of employment maritime, the proceeding is within the jurisdiction of the state courts under the original saving clause contained in sections 24 and 256 of the Judicial Code as it stood prior to the amendments of November 6, 1917, and June 10, 1922, as well as under the later amendments.

A. Maritime law does not prohibit such election.

Primarily a distinction is to be noted, based upon *Erie Railroad vs. Winfield*, 244 U. S. 170. This court there held invalid as to railroad employees

engaged in interstate commerce a provision of the New York Workmen's Compensation Act to the effect that employers and employees should be deemed to have elected to come within the workmen's compensation act if they did not within a certain time file a notice dissenting from said act. This was upon the ground that such provision was really a disguised compulsory application of the law, and that the state could not force the parties to elect to stay out. In the present case the election is not forced by a presumption in the statute, but is made by the affirmative and voluntary act of the employer in procuring insurance under the Workmen's Compensation Act, a wholly different matter.

We believe the decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, fully establishes the validity of such election. In the *Rohde* case the parties had accepted the Workmen's Compensation Act of Oregon as an elective act by their affirmative and voluntary act, and as the writer reads the opinion in that case the validity of such acceptance was one of the two independent grounds upon which the decision of this court was expressly based.

The validity of such election has also been sustained in the following decisions of state courts of last resort.

West vs. Kozer (Ore. 1922), 206 Pac. 542;
Berry vs. Donovan & Sons (Me. 1921), 115 Atl.
250;

Bockhop vs. Phoenix Transit Co. (N. J. 1922),
117 Atl. 624;
Lumbermen's Reciprocal Association vs. Adcock
(Tex. 1922), 244 S. W. 645;
Southern Surety Co. vs. Stubbs (Tex.), 199
S. W. 343;
Gillard's case (Mass.), 138 N. E. 384.

None of these decisions was discussed by the Supreme Court of California, though cited in our briefs, and no case is cited by that court in which the validity of such voluntary election has been doubted.

Approaching the matter in a more general aspect, the parties to a maritime contract may specify what law they desire to have read into its terms and govern their rights and liabilities under it.

Union Fish Co. vs. Erickson, 248 U. S. 308, 313;
63 L. Ed. 261;
Watts vs. Camors, 115 U. S. 353, 362; 29 L. Ed.
406;
Pritchard vs. Norton, 106 U. S. 124, 136; 27 L.
Ed. 104;
Wayman vs. Southard, 10 Wheat. 1, 48; 6 L. Ed.
252, 264.

In the last case cited the court says, through Mr. Chief Justice Marshall:

“As construed by the court, this section is the recognition of the principle of universal law, the principle that in every forum a contract is governed by the law with a view to which it was made.”

It is stated in *Corpus Juris*, Vol. 13, page 251:

“Where the parties have expressly provided that the contract shall be governed by the law of a particular country, this intention will as a rule be carried out by the courts, and a party is bound by his choice. Parties may substitute the laws of another place or country, than that where the contract is entered into, both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms. This is part of the *jus gentium*, and is enforced *ex comitate*, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of the contract.”

In *West vs. Kozer, supra*, the Supreme Court of Oregon had before it the application of the Oregon Workmen’s Compensation Act, a purely elective statute, to the whole field of maritime employments, five particular classes of maritime employments being involved in the case. The court upheld the application of the state compensation act and the jurisdiction of the Oregon commission upon all the points urged by us in the present case, the court saying in part:

“We do not understand the court as holding that an employer and an employee may not, as between themselves, contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident, and preclude the necessity of litigation in

the federal courts, which is the case here presented. The method is a beneficent one, insuring to every employee a certain remedy and fair compensation instead of difficult litigation, a doubtful remedy and in many cases resulting in no compensation.”

* * * * *

“It can not be shown that, in the instances brought to our notice by the present appeal, the allowance of the stipulated award will in any manner ‘work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.’ ”

“It is not the policy of the law, international or otherwise, to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out, and, in view of the decision last quoted, this ought to terminate the present controversy in favor of the petitioners.

“But the petitioners have a concrete case from the same court, the opinion being rendered by the same eminent justices who decided the cases of *Knickerbocker Ice Co. vs. Stewart* and *Western Fuel Co. vs. Garcia, supra*. We refer to the case of *Grant Smith-Porter Ship Co. vs. Rohde*, 256 U. S. — (257 U. S. 469), 42 Sup. Ct. 157, 66 L. Ed.—, United States Supreme Court case No. 35, decided January 3, 1922. The case briefly was this: * * *”

The court here states the facts of the *Rohde* case and then goes on to say:

"It will be observed that the last paragraph in the opinion practically concedes, that but for the fact that the parties had elected to come under the provisions of the compensation act, the jurisdiction in admiralty would have existed, which is what the petitioners contend here. It may also be noted that, while the United States District Court, in its second opinion, held that the libellant had an election of remedies, the Supreme Court of the United States held that his remedy in admiralty was abrogated by his consent to come under the terms of the state compensation act, which is going further than is required in the matters here under consideration, where all parties are seeking their remedy under the compensation act and have brought this proceeding to avoid the delay, expense, and uncertainty of proceeding in admiralty. While it can not be said that the circumstances in the case last above cited correspond in every detail to the cases at bar, they are nearly enough identical to illustrate the general principle, which is:

"That as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified as supplemented by state statutes."

"Here, as in the case last cited, there is no question of extraterritorial jurisdiction of the state involved. The contracts for services were made within the state, between employers and em-

ployees doing business within the state and at or upon waters lying within the boundaries of the state.

"Counsel for defendant have failed to point out any possible contingency under which an application of the compensation law might prejudicially interfere with the application of any of the rules of maritime law, which are so essential to the commerce of the country; and it is not believed that it is possible for such a contingency to arise. On the contrary, the encouragement of such agreements between employer and employee as is contemplated by our compensation laws, has a tendency to prevent litigation and, in instances like the present, to relieve the already overburdened federal courts of vexatious litigation.

"Many cases have been cited bearing more or less remotely upon the questions here discussed, but, while they have not been overlooked, we prefer to place our decision upon the latest utterances of the United States Supreme Court, in cases having a direct bearing upon the present controversy. If we correctly interpret these later opinions, we must find that the law is with the petitioners."

In the *Rohde* case, Rohde was held to have properly brought his suit in the State Industrial Commission after the decision of this court, except as to limitations (*Rohde vs. State Industrial Accident Commission* (1923), 217 Pae. 627).

B. *Recovery being upon contract in this class of cases, the case is within the "saving clause" con-*

tained in sections 24 and 256, Judicial Code, as originally enacted.

In *Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, the parties elected to come within the Connecticut Workmen's Compensation Act in the manner provided by said act. The obligation of the employer to furnish workmen's compensation benefits is treated as an obligation arising upon contract, the terms of the workmen's compensation act being an implied portion of the terms of the contract of hire. The court said:

"The contract in question (*i. e.*, of employment) may be assumed to be a maritime one. That would give the admiralty court the right to take jurisdiction over it. It could not take from our courts jurisdiction over a contract made in Connecticut by citizens of Connecticut, nor prevent its enforcement wherever it is operative by the procedure of the statute of its origin. This contract is to be interpreted and enforced by the application of the same principles accorded any contract. * * * Plainly, this proceeding is a personal action, and not one *in rem*. The admiralty court has not exclusive jurisdiction. *Knapp, Stout and Co. vs. McCaffrey*, 177 U. S. 638, 643; *Schoonmaker vs. Gilmore*, 102 U. S. 118; *Leon vs. Galceran*, 78 U. S. (11 Wall.) 185; *The Belfast*, 74 U. S. (7 Wall.) 624; *The Hine vs. Trevor*, 71 U. S. (4 Wall.) 555, 567, 568; *Manchester vs. Massachusetts*, 139 U. S. 240."

We therefore respectfully submit that nothing in the law maritime prevents the parties to a maritime contract of employment from voluntarily electing to come within the provisions of the state workmen's compensation act, including the enforcing agency provided by the statute of their adoption.

Respectfully submitted.

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